

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th July, 2012

+ **LPA No.229/2011**

% **UNION PUBLIC SERVICE COMMISSIONAppellant**
Through: Mr. Naresh Kaushik & Ms. Aditi
Gupta, Advs.

Versus

ANGESH KUMAR & ORS. Respondents
Through: Mr. Rajesh Kumar Tiwari,
Respondent No.2 in person.
Mr. B.V. Niren, Adv. for R-13.

AND

+ **W.P.(C) NO.3316/2011**

% **DURGESH KUMAR TRIPATHI & ORS.Petitioners**
Through: Mr. Devendra Sharma, petitioner
No.3 in person.

Versus

UNION PUBLIC SERVICE COMMISSION & ANR... Respondents
Through: Mr. Naresh Kaushik & Ms. Aditi
Gupta, Advs.
Mr. Mohit Jolly, Adv. for R-2.

CORAM :-
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. LPA No.229/2011 impugns the order dated 04.02.2011 of the learned Single Judge in Review Petition No.51/2011 preferred by the respondents seeking review of the order dated 13.01.2011 disposing of W.P.(C) No.218/2011 preferred by the respondents.
2. The twelve respondents in LPA No.229/2011 had appeared in the Civil Services Preliminary Examination held on 23.05.2010 by the appellant Union Public Service Commission (UPSC) and were unsuccessful therein. They sought certain information under the Right to Information Act, 2005 and which information was denied to them by the Public Information Officer of the appellant UPSC. Aggrieved therefrom, they filed W.P.(C) No.6931/2010 which was dismissed vide order dated 08.10.2010 on account of pendency then of SLP No.23250/2008 preferred by the appellant UPSC before the Supreme Court against the judgment dated 03.09.2008 of a Division Bench of this Court in LPA No.313/2007 titled ***UPSC Vs. Shiv Shambhu*** entailing the same question. The respondents thereafter filed SLP No.32443/2010 to the Supreme Court. The Supreme Court vide order dated 18.11.2010 dismissed SLP No.23250/2008 of the UPSC, for the reason of the change effected by the UPSC in the pattern of examination with effect

from the year 2011. Thereafter the Supreme Court vide order dated 03.12.2010 disposed of the SLPNo.32443/2010 preferred by the respondents observing that since SLP No.23250/2008 against the judgment dated 03.09.2008 of the Division Bench of this Court had been dismissed though as infructuous, the case of the respondents herein will also be governed by the said judgment dated 03.09.2008.

3. The respondents on the basis of said order dated 03.12.2010 of the Supreme Court again sought the information from the appellant UPSC and upon not meeting with any success, filed W.P.(C) No.218/2011, from which this appeal arises, seeking a direction to the appellant UPSC to disclose the following information:

- (i) details of marks (raw and scaled marks) obtained by the selected candidates in their respective optional subjects of the Civil Services Preliminary Examination, 2010;
- (ii) details of the marks (raw and scaled) obtained by the respondents themselves in the said examination;
- (iii) the cut off marks of each optional subject in the said examination.

4. The aforesaid writ petition was disposed of vide order dated 13.01.2011 observing, finding and holding as under:

- (i) that in view of the respondents having earlier applied under the RTI Act for the information and having thereafter preferred a writ petition in this Court and SLP in the Supreme Court, the respondents were not required to again follow the procedure under the RTI Act;
- (ii) that the law having been settled by the Supreme Court, there was no need to relegate the respondents to the process under the RTI Act;
- (iii) On the plea of the counsel for the appellant UPSC that raw marks were not available and thus could not be disclosed and that model answers were available only for some of the questions, it was observed that whatsoever was not available with the UPSC need not be disclosed;
- (iv) no prejudice would be caused to anyone by disclosure of the result of the candidates who had qualified;

- (v) that the model answers as available with the UPSC were also liable to disclosure, in accordance with the various dictas on the subject.

The appellant UPSC was accordingly directed to make the disclosure.

5. The respondents filed an application for review of the aforesaid order primarily challenging the statement of the counsel for the appellant UPSC that raw marks and the model answers for all the questions were not available. It was their contention that the appellant UPSC as per its rules was required to maintain the same for the prescribed period and which period had not expired.

6. The learned Single Judge vide impugned order dated 04.02.2011 on the said review application observed, found & held:

- (i) that the marks as appearing on the answer sheets are raw marks;
- (ii) that the answers sheets are required to be preserved for one year and thus the raw marks ought to be available with the UPSC;
- (iii) the contention of the appellant UPSC that raw marks did not subsist upon being scaled and thus could not be disclosed was

rejected. It was held that the raw marks have to be necessarily available;

- (iv) that since all the questions in the examination were of objective type, there could be no possibility of the model answers of any of them being not available;

UPSC was accordingly directed to disclose the raw marks as well as the model answers of the questions in the examination.

7. Notice of this appeal was issued and the operation of the order dated 04.02.2011 of the learned Single Judge stayed.

8. W.P.(C) No.3316/2011 is filed, also seeking a direction to the UPSC to disclose the same information as subject matter of LPA No.229/2011 relating to the same examination and qua the nine petitioners therein. While the said petition was pending before the learned Single Judge, it was pointed out that the controversy therein was the same as in LPA No.229/2011. Accordingly the said writ petition was transferred to this Bench and the counsel for the petitioners in the writ petition has raised the same arguments as the counsel for the respondents in the LPA.

9. As would be apparent from the above, the respondents prior to filing the writ petition from which this appeal arises had filed a writ petition for

the same relief but which writ petition was dismissed owing to the question entailed therein pending consideration before the Supreme Court in SLP No.23250/2008 preferred by the appellant; the respondents also had then preferred SLP No.32443/2010 and which SLP as aforesaid was disposed of with a direction that the respondents would be entitled to the same relief as given by the Division Bench of this Court vide judgment dated 03.09.2008 in LPA No.313/2007. It thus becomes necessary to first examine the said LPA No.313/2007. The same was preferred against the judgment dated 17.04.2007 of the Single Judge in W.P.(C) No.17583/2006. In the said writ petition also, the same disclosure as in the present proceedings was sought from the UPSC, though pertaining to the Civil Services (Preliminary) Examination, 2006 and UPSC had contested the demand for such disclosure on the same grounds as being urged herein.

10. It is the case of UPSC, that the Civil Services Examination comprises of two parts, i.e. the Preliminary Examination and the Main Examination which is followed by interview; that the Preliminary Examination is in the nature of a screening test to select twelve to thirteen times the number of vacancies in the order of merit; that the Preliminary Examination comprises

of two papers, one of General Studies which is compulsory and an optional paper from out of 23 subjects offered; that since different examinees opt for different optional paper, UPSC has developed a methodology to make the marks obtained in each subject comparable; through this methodology, scaling of marks is done so that the marks obtained in different subjects are comparable with each other; scientific formula is used for such scaling of marks; said scientific formula has been further changed and modified by the experience, to suit the needs and requirement of UPSC; that insofar as the marks of compulsory subject are concerned, no scaling is applied; that prior to the examination, no cut offs can be presumed and the cut offs that are implemented are only post examination; the marks in the Preliminary Examination are not counted in the Main Examination.

11. It is further the plea of UPSC that revealing the cut off marks and the keys to the question papers would enable unscrupulous persons to engineer and arrive at the scaling system which is kept secret by the UPSC; that if the scaling system adopted by the UPSC is disclosed, then the entire system would be undermined and defeat the selection.

12. The learned Single Judge in judgment dated 17.04.2007 in W.P.(C) No.17583/2006 found, observed and held, that the UPSC in a counter affidavit filed in the Supreme Court had already disclosed the scaling method adopted by it and thus the said scaling method could no longer be said to be secret or confidential; that there was no merit in the contention of UPSC that disclosure of cut off marks would undermine the selection process; that the disclosure of cut off marks of one year would not effect the examination of a subsequent year which is independent; that the data of one year has no bearing on the following years. Accordingly, holding that the scaling method already stood disclosed and there was no bar to the disclosure of the cut off marks and the model answers, direction for disclosure thereof was issued.

13. UPSC, as aforesaid preferred LPA No.313/2007 against the aforesaid judgment and which was dismissed on 03.09.2008. The SLP No.23250/2008 preferred by the UPSC to the Supreme Court has also been dismissed though as infructuous but without setting aside the judgments dated 17.04.2007 and 03.09.2008 (supra) of the Single Judge and the Division Bench of this Court. Rather, when SLP No.32443/2010 preferred

by the respondents came up before the Supreme Court, the same was disposed of with a direction that the respondents shall be entitled to the relief as given by the High Court in the said judgments.

14. In the aforesaid factual scenario, we are unable to find any scope for further adjudication inasmuch as the Supreme Court has already directed the information as aforesaid to be supplied to the respondents. Once it is held that the UPSC is bound to supply the said information, W.P.(C) No.3316/2011 will also have to be allowed inasmuch as the same information is sought therein. Though undoubtedly the petitioners in W.P.(C) No.3316/2011 ought to have first followed the procedure prescribed under the RTI Act but the petition having been entertained and having remained pending in this Court and this Court being required to adjudicate the controversy in any case in LPA No.229/2011, need is not felt to at this stage relegate the petitioners to following the procedure under the RTI Act.

15. The counsel for the UPSC before us has also urged that raw marks are an intermediary stage and ought not to be treated as information and only after scaling / actualization can the marks scored be computed and UPSC is not liable to disclose such intermediary marks. It is also argued that the

counter affidavit in the Supreme Court on the basis whereof it has been held that the method of scaling already stands disclosed, does not in fact disclose the same and the scaling system is thus not in public domain.

16. We are afraid, the latter of the aforesaid argument cannot be entertained at least before this Court. The Single Judge in judgment dated 17.04.2007 (supra) held that the method of scaling stood disclosed in the counter affidavit in the Supreme Court and we do not find any argument to have been raised by UPSC before the Division Bench that the method of scaling had not been so disclosed. There is no discussion whatsoever in the judgment dated 03.09.2008 of the Division Bench in this regard. Again, if it was the case of UPSC that the method of scaling had not been disclosed and this Court had wrongly presumed the same to have been disclosed, the UPSC ought not to have got its SLP dismissed as infructuous and ought to have got the said matter adjudicated by the Supreme Court. On the contrary, the Supreme Court by dismissal of the SLP of the UPSC and by order dated 03.12.2010 in the SLP of the respondents has expressly directed the disclosure of the method of scaling. After the matter has been dealt with by the Supreme Court, through speaking order, it is not for this Court to re-examine the same.

17. We are even otherwise of the view that there could be no secrecy or confidentiality about the method of scaling / actualization adopted by an examiner. The very objective of the RTI Act is transparency and accountability. The counsel for the UPSC has been unable to show as to how the disclosure of the scaling / actualization method prejudices the examination or affects its competitiveness. The Supreme Court in ***U.P.P.S.C. Vs. Subhash Chandra Dixit*** AIR (2004) SC 163 approved of the practice of scaling / actualization, though in the subsequent decision in ***Sanjay Singh Vs. U.P.P.S.C.*** AIR (2007) SC 950, certain reservations were expressed with respect thereto. Be that as it may, though the non-disclosure of the method devised for scaling / actualization till declaration of the result may be justified, it cannot be said to be justified after the result is declared. The Supreme Court in ***The Institute of Chartered Accountants of India Vs. Shaunak H. Satya*** (2011) 8 SCC 781 has held that the answer scripts and the answer keys are liable to disclosure after the result of the examination has been declared. If it were to be held that there is any secrecy / confidentiality about the raw marks and the method of scaling, the possibility of errors therein or the same being manipulated cannot be ruled out. An examinee is entitled to satisfy himself / herself as to the fairness

and transparency of the examination and the selection procedure and to maintain such fairness and transparency disclosure of raw marks, cut off marks and the scaling method adopted is a must.

18. We therefore do not find any merit in LPA No.229/2011 and dismiss the same. Axiomatically, W.P.(C) No.3316/2011 is allowed and the UPSC is directed to within eight weeks hereof disclose the information sought therein.

19. Though UPSC has indulged in re-litigation but giving benefit of doubt to UPSC that the resistance to disclosure is an after effect of the pre-RTI era, we refrain from imposing any costs on UPSC.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

JULY 13 , 2012

‘gsr’